REDACTED FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment And/or Transfer of Control of Licenses, Adelphia Commissions Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	)	MB Docket No. 05-192

COMMENTS OF AT&T INC.

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1. Introduction and Summary

The fundamental question in this proceeding is whether conditions in the video market have changed sufficiently such that the prohibition imposed by Congress against exclusive contracts involving satellite-delivered, cable-affiliated programming no longer is necessary to preserve and protect competition and diversity in the distribution of video programming, and thus whether that ban should be scaled back, or eliminated entirely.[1] While the MVPD market undoubtedly has changed since the Commission last extended the exclusive contract prohibition in 2007, those changes have not spilled over into the programming market and thus have not obviated the need for the ban to preserve and protect video competition and diversity, and, concomitantly, further promote broadband investment and deployment. In particular, the growth in MVPD competition has not fundamentally altered the market structure and conditions in the video programming market that led Congress to adopt the exclusivity prohibition in 1992, and led the Commission to extend that limitation in 2002 and 2007.[2]

The incentive and ability of vertically integrated cable operators and their programming affiliates to hinder competition in the distribution of video programming by withholding critical programming remain as strong today as they were in 2007, when the Commission renewed the exclusivity prohibition.[3] As in 2007, and as starkly demonstrated by the pages and pages of

[1] *Revision of the Commission's Program Access Rules; News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; and Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), assignees, et al,* MB Docket No. 12-68; MB Docket 07-18; and MB Docket 05-192, Notice of Proposed Rulemaking, FCC 12-30 (Rel. March 20, 2012) ("NPRM").

[2] *Implementation of the Cable Television and Consumer Protection Act of 1992,* CS Docket No. 01-290, Report and Order, 17 FCC Rcd 12124, 12130-31 (2002) ("*2002 Program Access Order*"); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* MB Docket No. 07-198, Report and Order, 22 FCC Rcd 17791, 17856, P 107 (2007) *("2007 Program Access Order"),petition for review denied sub nom Cablevisions Sys. v. FCC,* 597 F.3d 1306 (D.C. Cir. 2010).

[3] *Id.*

vertically integrated networks listed in Appendix B to the NPRM, vertically integrated cable operators continue to control much of the most popular and widely-distributed programming. These include popular programming networks, like USA Network, A&E, Discovery, and a host of regional sports programming networks (RSNs), as well as other cable networks that carry top-rated shows with fiercely loyal audiences, such as Mad Men and Pawn Stars. Simply put, competing MVPDs – including both DBS providers and telco video entrants – cannot successfully go to market, and, as or more importantly, increase or even sustain their competitive positions, without access to such highly demanded programming. But, as AT&T's own recent experience confirms, and the Commission's own recent orders requiring vertically integrated programmers to make available certain RSNs available to competitive MVPDs (including AT&T) illustrate, incumbent cable operators and their affiliated programming networks still attempt to use their control over such programming to try to artificially limit competition in downstream video distribution markets.[4] If anything, cable's incentive to engage in such tactics is even greater now that competition to incumbent cable operators finally has begun to take hold.

Maintaining the exclusivity prohibition is critical to ensure that popular programming continues to be competitively available, and thus is essential to the continued development and preservation of competition and diversity in the video distribution market, as well as to promote broadband deployment and competition. While competitive MVPDs have succeeded in

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[4] *See, AT&T Servs. Inc. et al.*, Order, 26 FCC Rcd 13206 (2011), *affirmed*, *AT&T Servs. Inc. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011), *appeal pending sub nom.Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2d Cir.) (*"AT&T vs. Cablevision Complaint."); AT&T Services, Inc. et al*, Program Access Complaint, File No. CSR-8066-P (filed Sept. 11, 2008), *AT&T Services, Inc. et al*, Amended Program Access Complaint, File No. CSR-8066-P (filed Oct. 3, 2008) ("*AT&T v. Cox Complaint*") (unless otherwise indicated, all references herein to the *AT&T v. Cox Complaint* are to the Amended Program Access Complaint filed on Oct. 3, 2008); and *AT&T Servs. Inc,. vs. Rainbow Media Holdings, LLC,* File No. CSR-7429-P (Filed June 18, 2007) *("AT&T vs. Rainbow Complaint"). See also Verizon Tel. Cos. et al.*, Order, 26 FCC Rcd 13145 (2011), *affirmed*, *Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2d Cir.).

increasing their subscribership over the past five years, as the Commission's own figures document, incumbent cable operators continue to serve the lion's share of video subscribers both nationally and in most, if not all, local markets.[5] For example, AT&T has increased subscribership for its award winning U-verse TV service from less than one million in 2007 to about four million earlier this year.[6] But that amounts to less than four percent of all MVPD subscribers nationwide, and AT&T's average penetration of eligible living units is only about 17 percent.[7] Because incumbent cable operators continue to dwarf their rivals, the short term costs of foregoing revenues from the sale of programming to rivals is minimal relative to the revenues they stand to lose if their subscribers switch to competitors. If access to critical programming now is cut off, competition from AT&T and other wireline providers could wither on the vine, denying consumers the benefits of the sort of robust competition that only such wireline competitors can offer.

Relaxing the ban and relying on complaints pursuant to section 628(b) to redress anticompetitive conduct is not the answer. As AT&T's experience with program access complaints confirms,[8] adjudication is very costly and plagued with interminable delays lasting, in some cases, several years, during which consumers are deprived of the programming and competitive alternatives they desire. Adjudication also imposes heavy burdens on the

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[5] NPRM, Appendix A (noting that, nationally, cable operators continue to control 58.5% of MVPD subscribers, down from 67% in 2007; while DBS serves 33.9%, up from approximately 30%; and wireline providers, like AT&T, serve the remaining 7.6%).

[6] AT&T Investor Briefing 1Q 2012, at 8 (Apr. 24, 2012), available at http://www.att.com/Investor/Earnings/1q12/ib_final_1q12.pdf (last visited Jun. 18, 2012) (AT&T 1Q 2012 Investor Briefing).

[7] *Id.*

[8] These include a complaint involving satellite-delivered programming against Cablevision for withholding all MSG/MSG+ programming, a complaint against Cox for withholding terrestrially delivered RSN programming, and a second complaint against Cablevision for withholding the HD streams of MSG/MSG+ programming. *AT&T vs. Rainbow Complaint*; *AT&T vs. Cablevision Complaint.*

Commission by requiring it to devote significant time and resources to ascertain the impact of withholding specific video content on competition and diversity in the video distribution market, and thus on consumers. Even a rebuttable presumption that withholding of content violates section 628(b), like that adopted by the Commission with respect to terrestrially delivered RSN programming, does not prevent vertically integrated cable operators and their programming affiliates from engaging in anticompetitive withholding strategies to prevent, or at least significantly delay, competition in downstream video distribution markets, as AT&T's experience with its second program access complaint against Cablevision so amply demonstrates.

While, as the Commission notes, maintaining competitive access to "must have" programming is what is essential to preserve and protect competition and diversity in video programming distribution, such programming is no longer limited or centralized only to a few programming networks. Instead, "must have" programming, such as Suits or Burn Notice on Comcast's affiliated USA Network, can be found on a much broader array of channels than ever before. Moreover, consumers' programming tastes vary widely, often even within a single household. As a consequence, competitive MVPDs do not simply need access to a handful of marquee programming networks; rather, they must offer a package of programming to offer consumers generally a viable competitive alternative. As a practical matter, any attempt to narrow the exclusivity prohibition by limiting it to "must have" programming likely would sweep in a similarly broad array of channels, and thus largely be an exercise in futility.

Retaining the ban would not deprive consumers of the benefits that exclusivity arrangements can provide. Section 628 already provides a process for vertically integrated cable operators/programmers to petition the Commission for a finding that exclusivity is in the public interest. In the 20 years since that provision was enacted, the Commission has received only ten petitions, and only five were prosecuted all the way to a Commission decision (of which two were granted). The fact that so few petitions have been filed suggests that exclusivity arrangements are not necessary to encourage innovation and investment in new video programming, and that is confirmed by the explosion in new video programming networks while the exclusivity ban has been in place. It is further confirmed by the paucity of exclusivity arrangements involving non-vertically integrated programming – indeed, AT&T can think of only one such arrangement (DIRECTV's exclusivity arrangement with the NFL, with which no video programming distributor is vertically integrated, for the Sunday Ticket), and, even under that arrangement, the exclusivity is for a specialized package of the underlying programming, not all of the programming components that make up that package. To the extent the Commission is concerned that the existing ban might preclude procompetitive exclusivity arrangements under today's market conditions, it could consider streamlining the public interest petition process (such as allowing such a petition to go into effect by operation of law if no one opposes the petition).

For these reasons, it would be premature for the Commission to allow the "program access" provisions of the Act to sunset at this time. Instead, the Commission should once again extend the exclusivity prohibition. It also should consider streamlining the process by which vertically integrated cable operators/programmers can obtain a ruling that exclusivity is in the public interest to the extent it is concerned that the current process is denying consumers the benefits that may accrue to such arrangements under appropriate conditions.

2. The Conditions that led Congress to Exclusive Programming Contracts Between Vertically Integrated Cable Providers and Their Programming Affiliates Have not Changed

In 1992, Congress enacted the prohibition against exclusive programming contracts in section 628(c) because it correctly recognized that ensuring fair and equitable access to programming was critical to foster and sustain vigorous competition to incumbent cable operators and to promote diversity in the multichannel video programming distribution marketplace.[9] It further recognized that, given the prevalence of vertical relationships between incumbent cable operators and upstream video programming suppliers, cable operators had both the incentive and ability to use their control over affiliated programming providers to deny competing MVPD suppliers access to popular programming, which is the life blood of competition in the video distribution space.[10] Specifically, Congress found that vertically integrated cable programmers "may simply refuse to sell to potential competitors," given their "incentive and ability to favor cable operators over other video distribution technologies."[11] Thus, in order to "increase[e] competition and diversity in the multichannel video programming market . . . and to spur the development of communications technologies,"[12] Congress required the Commission to adopt rules prohibiting exclusive contracts for the distribution of satellite

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[9] S. Rep. No. 102-92, at 26 (1991) ("Restricted access to programming products by a wholesale programmer which is also a retail competitor, reflects the vertically integrated nature of the market and the basic barrier in the development of a competitive market. Without fair and ready access on a consistent, technology-neutral basis, an independent entity like [the National Rural Telecommunications Cooperative] cannot sustain itself in the market.') (Senate Report).

[10] *Id.* (noting that programmers can pick and choose those outlets to which they will provide distribution rights, but were not doing so "based on the quality of an organization's marketing expertise, the financial integrity of the distributor, the size of the potential market, or the lack of cable access (as in rural areas)," but rather based on whether licensing a particular distributor would harm its cable affiliate).

[11] *Id.* at 26, 28.

[12] 47 U.S.C. § 528(a).

delivered programming between a cable operator and any satellite programming vendor vertically integrated with a cable operator.[13]

Congress recognized that not all exclusive contracts are anticompetitive; rather, under appropriate conditions exclusivity is a legitimate, precompetitive business strategy.[14] Congress thus "limited [the exclusive contract prohibition] to vertically integrated companies because the incentive to favor cable over other technologies is most evident with them."[15] And, it provided an escape hatch to permit vertically integrated cable operators and their programming affiliates to enter exclusive contracts if the Commission determines such contracts are in the public interest.[16] The Commission implemented this provision by establishing a process for a cable operator or satellite programmer vertically integrated with a cable operator to file a petition seeking approval to enter or enforce an exclusive contract for an area on the ground that exclusivity is in the public interest.[17] The Commission further provided that, in evaluating such petitions, it would consider the effect of a contract on: competition in video distribution markets, video distribution technologies other than cable, investment in new programming, and diversity in the MVPD market. It also considers the duration of an exclusivity arrangement. 47 C.F.R. at § 76.1002(c)(4).

Congress further provided for section 628's prohibition against exclusive contracts to sunset after 10 years unless the Commission found that it "continue[d] to be necessary to

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[13] 47 U.S.C. § 528(c)(2)(D).

[14] Senate Report at 28.

[15] *Id.*

[16] 47 U.S.C. § 528(c)(2)(D), (c)(4).

[17] 47 C.F.R. § 76.1002(c)(5).

preserve and protect competition and diversity in the distribution of video programming.[18] Congress thus established a mechanism for the limit on exclusivity to expire, but only if market conditions had so changed that the factors leading it to adopt the prohibition no longer applied. In its initial review of the exclusivity provision, the Commission concluded that Congress intended the exclusivity ban to continue to apply so long as "vertically integrated programmers . . . have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and program distributors using other technologies," and if "such behavior would result in a failure to protect and preserve competition and diversity in the distribution of video programming."[19]

In 2002, and again in 2007, the Commission rightly concluded that market conditions had not changed sufficiently that allowing the exclusivity prohibition to expire would be in the public interest.[20] While it acknowledged that the competitive landscape for the distribution of multichannel video programming had changed insofar as the number of competitive MVPDs, and the number of subscribers served by those MVPDs, had increased significantly, it concluded that, notwithstanding these changes, "the concern on which Congress based the program access provisions . . . persists in the marketplace.[21] Specifically, it found that, "in the absence of regulation, vertically integrated programmers have the ability and incentive to favor affiliated cable operators over nonaffiliated cable operators and programming distributors using other

[18] 47 U.S.C. § 548(c)(5).

[19] *See 200 Program Access Order* at 12130-31.

[20] *2002 Program Access Order*, 17 FCC Rcd at 12125, *2007 Program Access Order* at ¶ 5.

[21] *2007 Program Access Order* at ¶ 5, quoting *2002 Program Access Order* at 2153-54.

technologies such that competition and diversity in the distribution of video programming would not be preserved and protected."[22]

Vertically integrated cable operators and their programming affiliates undoubtedly will argue, as they did in 2002 and again in 2007, that the market has changed substantially since the Commission last extended the exclusivity limitation, and that these changes have eliminated their incentive and ability to withhold programming to harm their competitors and maintain cable's dominance in the video distribution market. In particular, they are likely to argue that the increase in subscribership to competitive MVPD services and decrease in the percentage of cable-affiliated programming networks has obviated the need to retain the exclusivity limitation to preserve and protect competition and diversity of the distribution of video programming. But these changes have not fundamentally altered the market structure and concerns that led Congress to adopt the exclusivity ban, and the Commission to extend that ban in 2002 and 2007. In particular, they do not alter the fact that vertically integrated cable operators continue to control programming that is essential to the success of competing MVPDs, nor do they blunt the incentive and ability of vertically integrated programmers to withhold such programming to limit competition to downstream cable incumbents, as AT&T's own experience since 2007 demonstrates. If anything, the market changes since 2007 have increased vertically integrated programmers' incentive to withhold in the absence of regulation.

A. Cable's Continued Control of Critical Programming Assets Gives it the Ability To Limit Competition and Diversity in the Distribution of Video Programming.

As in 2007, vertically integrated cable operators and their programming affiliates continue to control much of the most popular and widely distributed programming. To be sure, since the Commission last extended the limitation on exclusivity in 2007, the percentage of

[22] *Id.*

cable-affiliated national programming has declined from 22 percent to approximately 14.4 percent.[23] But that is because the number of new programming networks that are not cable-affiliated launched since 2007 has grown significantly; and many, if not most, of these networks have low ratings, and thus do not significantly impact consumers' decisions whether to subscribe to a particular MVPD service and to switch providers. As the Commission has recognized, those decisions are driven by the popularity of programming (not the sheer volume of programming networks) carried on a particular MVPD service. Specifically, in the 2007 extension, the Commission observed, "What is most significant to our analysis is not the percentage of total available programming that is vertically integrated with cable operators, but rather the popularity of the programming that is vertically integrated and how the inability of competitive MVPDs to access this programming will affect the preservation and protection of competition in the video distribution marketplace."[24] Here the picture is not so rosy: the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks has actually increased (from six to seven) since 2007, while the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks, as ranked by average *prime time* ratings remained at seven.[25] These include such popular networks as USA Network, A&E, Discovery, History, Bravo, and many others. Given the popularity of these networks, competing MVPDs cannot offer the robust competition to cable incumbents envisioned by Congress without them.

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[23] *NPRM* at ¶ 26.

[24] 2007 extension at ¶ 37.

[25] *NPRM* at ¶ 26; Appendix B.

But it's not just the networks themselves that are indispensable to offer consumers a competitive choice of video providers. Rather, it is the programming on those networks that makes them so important to, and demanded by, consumers. And, in this regard, ***six of the top ten cable series*** of 2011 (based on average viewers) were run on vertically integrated cable networks. These include History (*Pawn Stars and American Pickers)*, and USA Network (*Royal Pains, Suits and Burn Notice*).[26] Here again, competing MVPDs cannot offer a viable competitive alternative to incumbent cable operators if they are denied access to such popular, cable-affiliated programming. That is why attempting to narrow the exclusive contract limitation by, for example, limiting it only to the Top 20 satellite-delivered programming networks would not work. In that case, vertically integrated cable operators and their programming affiliates could simply move such programming to different networks in order to avoid the prohibition, and thus limit competition to cable.

Vertically integrated cable operators also have increased their control over regional sports networks, which Congress, the Commission, and the courts all have recognized are important for competition and non-replicable, and for which there are no good substitutes.[27] As Commission noted in the *NPRM*, the number of RSNs affiliated with cable has increased from 18 in 2007 to

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[26] TV Guide, *Jersey Shore is the Most-Watched Prime-Time Cable Series of the Year*, December 14, 2011, available at http://www.tvguide.com/News/Jersey-Shore-Cable-1040830.aspx, last viewed June 4, 2012.

[27] *See Vertically Integrated Sports Programming: Are Cable Companies Excluding Competition?*, Hearing Before the S. Comm. On the Judiciary, 109th Cong. (Dec. 7, 2006); *NPRM* at ¶ 28 (citations omitted), *See Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695, 708 (D.C. Cir. 2011) ("When a vertically integrated cable programmer limits access to programming that customers want and that competitors are unable to duplicate—like the games of a local team selling broadcast rights to a single sports network—competitor MVPDs will find themselves at a serious disadvantage when trying to attract customers away from the incumbent cable company. To use a concrete example, we doubt that Philadelphia baseball fans would switch from cable to an alternative MVPD if doing so would mean they could no longer watch Roy Halladay, Cliff Lee, Roy Oswalt, and Cole Hamels take the mound, even if they thought the alternative MVPD was otherwise superior in terms of price and quality. Facing such a structural disadvantage, a potential MVPD competitor might realistically conclude that expanding its presence in the Philadelphia market would be uneconomical, thus limiting its ability to provide video programming—and hence satellite video programming—to customers.).

31, and the percentage of all RSNs that are cable-affiliated has increased from 46 percent to approximately 52 percent. As the Commission has repeatedly recognized, there are no adequate substitutes for regional sports programming because sports fans believe that there are no good substitutes for watching their local and/or favorite team play a game, and no amount of investment would enable a competitor to offer such a substitute.[28]

The harm to competition and diversity in the distribution of video programming that would result if vertically integrated cable operators and their affiliates once again could deny satellite delivered programming to their competitors is very real. As the Commission recognized in 2007, when it last extended the exclusivity prohibition, because the exclusive contract prohibition has been in effect since 1992, there is little, if any, empirical data regarding the impact of withholding satellite delivered programming.[29] But there was evidence that withholding of programming outside the scope of that ban (that is, terrestrially delivered regional sports programming) by vertically integrated programmers had a material adverse impact on competition in the video distribution market.[30] And, based in significant part on that evidence, the Commission concluded that vertically integrated programmers continued to have the ability to favor their affiliated cable operators over competing MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected if the exclusivity ban were to sunset.[31]

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[28] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket 07-198, First Report and Order, 25 FCC Rcd 746, (2010) *("2010 Terrestrial Loophole Order") Vacated by, in part, Review granted by, in part, Review denied by, in part, Remanded sub nom Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) at ¶¶ 52-58. *Also see AT&T vs. Cablevision Complaint* Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011).

[29] *2007 Order* at ¶ 39.

[30] *Id.,* citations omitted.

[31] *Id.* at 42.

That continues to be the case, as evidenced by AT&T's need to resort repeatedly to litigation during the past five years to obtain access to cable-affiliated regional sports programming. As the Commission has recognized, regional sports programming is "must have" programming, access to which is critical to the competitive viability of any MVPD. Indeed, as AT&T showed in connection with its efforts to obtain rights to this programming, a significant percentage of customers surveyed believed it was important or extremely important to have such programming included as part of their channel line-up.[32] And a significant percentage of those customers surveyed who were not interested in subscribing to AT&T's U-verse TV service indicated that the reason was the absence of such regional sports programming.[33] These data confirm that withholding such programming has a material adverse effect on competition in the distribution of video programming.

In recent years, some cable networks have flatly refused to provide AT&T access to such critical programming or to high definition versions of it. This course of conduct confirms that cable operators continue to have the incentive and ability to withhold critical programming from their competitors and, consequently, that the exclusive access prohibition remains as necessary

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[32] For example, an internal survey conducted by AT&T in 2008, and attached to AT&T's program access complaint against Cox for withholding Cox-4 (which had exclusive rights to Padres programming), showed that over **[highly confidential*** ***end]** percent of San Diego video programming customers surveyed believe it was "important" or "extremely important" to "have the Padres channel included as part of [their] cable or satellite channel lineup." *AT&T v. Cox Complaint,* Sambar Decl. ¶ 7 & Ex. 4 at 18. Further, over **[highly confidential*** ***end]** percent of those surveyed stated they would be "somewhat unlikely" or "extremely unlikely" to consider service from a television service provider that did not offer Cox-4, even if that provider offered incentives such as tickets to Padres baseball games or a $50 Visa gift card. *Id.*, Sambar Decl. ¶ 7 & Ex. 4 at 17 (Attachment 1).

[33] *See AT&T Reply to Cox Answer,* Hollander Declaration ¶ 51 (finding that 17.0 percent of those customers surveyed who were either "Not interested" or "Probably not interested" in subscribing to U-verse after viewing a commercial explaining that U-verse includes a variety of sports programming but not Cox-4, *independently volunteered* that a reason for their lack of interest was the absence of Padres programming) (Attachment 2). *See also* Leo J. Shapiro & Associates, *AT&T Connecticut v. Madison Square Garden, L.P. and Cablevision Systems Corp.: A Study of Consumer Perception* at 14, 17-18 (Attachment 6), attached to AT&T's Brief, *AT&T Services, Inc. et al, Program Access and Section 628(b) Complaint,* File No. CSR-8196-P (filed Nov. 2010) (When asked whether knowing that Cablevision offered the HD programming of all New York area sports teams at no extra charge — but AT&T U-verse did not — had any impact on their interest in U-verse, 21% of respondents said that it made them *less* interested in subscribing to U-verse.).

now to preserve and protect competition and diversity in the distribution of video programming as it was in 2007. We summarize, briefly, below actions by cable operators to deny AT&T access to regional sports programming networks in San Diego and Connecticut.

San Diego (Cox) program access complaint.

AT&T launched its U-verse video service in San Diego in June 2007. In October 2005, in preparation for that launch, AT&T approached Cox about carrying Cox-4, which is a terrestrially delivered regional sports network then owned by Cox that has exclusive rights to broadcast San Diego Padres games in the San Diego area. Cox rebuffed that approach, stating that it was not accepting new affiliates for Cox-in San Diego 4 at the time and that Cox was satisfied with the level of distribution of the service. At the same time, however, Cox was willing to, and did, license Cox-4 to cable operators that did not compete directly with Cox.[34] As a consequence, AT&T was forced to launch U-verse in San Diego in June 2007 without access to San Diego Padres baseball. AT&T soon found that customers signing up for U-Verse were surprised and frustrated by the lack of San Diego Padres baseball, leading a significant number of customers drop their subscription to U-verse. In fact, AT&T had to modify its sales practices and make specific disclosures to new subscribers that U-Verse did not carry San Diego Padres games.[35]

In 2008, AT&T again approached Cox seeking carriage of Cox-4. Once again, Cox rebuffed AT&T's request, stating that it would not distribute Cox-4 to non-wireline or telco

[34] *See*, AT&T Services, Inc. *et al*, Amended Program Access Complaint, File No. CSR-8066-P (filed Oct. 3, 2008) (*AT&T v. Cox Complaint*) at ¶¶ 19-29 (Attachment 3).

[35] *AT&T v. Cox Complaint,* Reply Decl.of Christopher Sambar, at ¶¶ 4-5 (filed Nov. 21, 2008) (Attachment 4).

cable providers. AT&T offered to negotiate just for the rights to the Padres games, without any additional Cox-4 programming, but Cox again refused to negotiate with AT&T.[36]

Having no other choice, AT&T filed a program access complaint against Cox on September 11, 2008.[37] AT&T included with its complaint internal studies (copies of which are attached) showing, among other things, that: (1) AT&T's penetration rate in San Diego was weakened and its churn rate increased as a result of consumers learning that AT&T's U-verse TV service did not include Padres programming; (2) a significant percentage of prospective customers were deterred by the absence of Padres programming; and (3) in many cases, customers who cancelled their order, either before or after initiating service, cited the lack of Padres programming as their reason for doing so.[38] As discussed below, that complaint was never resolved. However, six months after the Commission approved its 2010 Terrestrial Loophole Report and Order, Cox hired Fox Networks to negotiate license fees for Cox-4, but AT&T was unable to strike a deal for Cox-4 because of the very high license fees Fox demanded.

Connecticut (Cablevision) program access complaint.

AT&T had a similar experience in Connecticut where Cablevision repeatedly denied AT&T access to Madison Square Garden Network (MSG) and MSG+ programming – first to any MSG programming whatsoever, and later to the High Definition (HD) Feeds of such

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[36] *AT&T v. Cox Complaint* at pp.8-10.

[37] *AT&T v. Cox Complaint.*

[38] *AT&T Reply to Cox Answer* at 23; 27-30 (Attachment 5). For example, a survey conducted in 2008 showed that over **[highly confidential***   ***end]** percent of San Diego video programming customers surveyed believe it was "important" or "extremely important" to have the Padres channel included as part of their cable or satellite channel lineup. Attachment 1, Sambar Decl. ¶ 7 & Ex. 4 at 18.

programming, forcing AT&T to bring repeated program access complaints against Cablevision.[39] MSG is a regional sports network with exclusive rights to carry the games of several New York area professional sports franchises, including the New York Knicks, New York Rangers (both owned by the Dolan family, the same owners as Cablevision and MSG), New York Islanders, and New Jersey Devils, which are highly demanded by Connecticut viewers in areas close to New York City. AT&T first contacted Rainbow Media (then a wholly-owned subsidiary of Cablevision that owned MSG) to request carriage of several RSNs around the country, including carriage of MSG programming on U-verse in Connecticut in January 2005. AT&T's U-verse service in Connecticut overlaps areas served by Cablevision's cable systems. By canceling meetings, missing deadlines, and offering pretextual excuses, Rainbow delayed substantive negotiations with AT&T from January 2005 through March 2006. When Rainbow finally provided a carriage proposal for some of its RSNs on March 31, 2006, the proposal did not include the New York-area RSNs.

In December 2006, when the parties were nearing agreement on terms for a license for other programming that was supposed to serve as a template for licenses for, *inter alia*, Rainbows RSN programming, Rainbow announced that it would not grant AT&T a license for any programming unless AT&T held a cable franchise for the markets at issue. In early April 2007, AT&T and Rainbow resolved this issue with respect to certain markets outside Connecticut, and Rainbow thus granted AT&T licenses to carry RSN programming in those markets, none of which overlapped with Cablevision's territory. But Rainbow steadfastly refused to allow AT&T to carry MSG programming in Connecticut, where Cablevision was the incumbent cable operator, ostensibly on the ground that AT&T did not have a valid franchise to

[39] *AT&T vs. Rainbow Complaint*

operate there, even though the Connecticut DPUC had ruled that AT&T did not need a cable franchise to operate its IP-based U-verse TV service, and the state legislature in June 2007 granted AT&T a state-wide video franchise. When Rainbow refused to acknowledge the Connecticut legislation, and then raised new issues that they claimed prevented them from licensing MSG/MSG+ to AT&T, AT&T filed its first program access complaint against Cablevision/Rainbow.

Only in October 2007, more than two years after AT&T first sought to license MSG/MSG+ programming, did Rainbow agree to grant such a license. But that was only after Commission staff indicated during a status conference that a decision on AT&T's complaint was forthcoming, and that the decision likely would not be favorable to Cablevision/Rainbow. Even then, Rainbow granted AT&T a license only to the standard definition (SD) format of MSG/MSG+ programming (which was delivered via satellite) although it is common practice in the industry for programmers to include the HD feeds of particular programming along with SD format of that programming. It refused even to negotiate regarding the HD feeds of MSG/MSG+ programming on the ground that those feeds were delivered terrestrially, and thus outside the scope of the program access provisions of the Act. Plainly, the only reason Rainbow agreed to license AT&T to carry even the satellite-delivered, SD format of MSG/MSG+ programming in competition with its cable affiliate, Cablevision, was because the exclusive access prohibition forced it to do so.

Throughout 2008 and early 2009, AT&T engaged in extensive negotiations with Cablevision/Rainbow to obtain carriage of the HD feeds of MSG/MSG+ programming. Although Cablevision licensed those feeds to other MVPDs in Connecticut, including Time Warner, Comcast and DirecTV, it adamantly refused to license them to AT&T and Verizon, which (unlike those MVPDs) provided wireline video distribution services in head-to-head competition with Cablevision in Connecticut and New York. When those negotiations proved fruitless, AT&T was forced, once again, to file program access complaint against Cablevision/MSG (during this period, Cablevision spun MSG off from Rainbow) in August 2009.

While AT&T's complaint was pending, the Commission adopted the *2010 Program Access Order*.[40] In that order, the Commission rejected claims by vertically integrated cable operators and their programming affiliates that terrestrially delivered programming was beyond the scope of section 628(b).[41] The Commission also established a rebuttable presumption that a vertically integrated cable operator's unfair acts with respect to affiliated regional sports programming (including the HD streams of such programming) — such as Cablevision's outright refusal to license MSG HD and MSG+ HD to AT&T — have the purpose or effect of significantly hindering competition.[42]

Following this order, Cablevision continued to withhold MSG/MSG+ HD from AT&T, even as it touted in its marketing materials that, if subscribers wanted MSG/MSG+ HD programming, they had to subscribe to Cablevision. Thus, AT&T was forced to continue litigating to secure access to that programming. To that end, AT&T was forced to spend considerable time and money developing empirical evidence to support the rebuttable presumption the Commission established regarding regional sports programming. That evidence showed that "MSG/Cablevision's exclusive offering of HD programming of all nine New York

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[40] *2010 Terrestrial Loophole Order*

[41] *Id.*

[42] *Id.* at ¶¶ 52-55.

area sports teams provides a significant competitive advantage for MSG/Cablevision and a significant competitive disadvantage for AT&T."[43]

In September 2010, the Media Bureau granted AT&T's complaint against Cablevision/MSG, concluding that Cablevision/MSG's withholding of MSG HD and MSG+ HD from AT&T had the "effect" of "significantly hindering" AT&T's ability to offer a competitive video service in Connecticut.[44] In November 2010, the Commission denied Cablevision/MSG's application for review and affirmed the Bureau's decision.[45]

These cases amply demonstrate that, in the absence of restrictions, vertically integrated cable operators and their programming affiliates continue to have the incentive and ability to deny competing providers of MVPD services access to popular programming. They thus confirm that maintaining the exclusivity prohibition is critical to preserving and protecting competition and diversity in the video distribution market.

To be sure, section 628(b) provides some measure of protection with respect to "must have" programming. But, that provision will not, by itself, prevent anticompetitive practices that deny competitive MVPDs the programming they need to be effective competitors. For one thing, a complainant bringing a section 628(b) complaint must show that the withholding of a particular program or network is an unfair method of competition or unfair or deceptive act or practice, the purpose or effect of which is to hinder significantly or prevent an MVPD from competing. Compiling the evidence necessary to make such a showing and litigating the matter before the Commission can take months, or years, and that delay alone can inflict serious

[43] Leo J. Shapiro & Associates, *AT&T Connecticut v. Madison Square Garden, L.P. and Cablevision Systems Corp.: A Study of Consumer Perception*, at 18 (Attachment 6).

[44] *AT&T vs. Cablevision Complaint* at ¶ 69.

[45] *AT&T vs. Cablevision Complaint*, 26 FCC Rcd 15871 (2011).

competitive harm on competitive MVPDs. While the Commission's rebuttable presumption created for regional sports programming makes the path somewhat easier, that presumption does not obviate the need for litigation in the face of an obstinate cable operator, as AT&T's experience shows. Equally important, regional sports programming is but one type of programming that can be critical to a competitive MVPD. There is no presumption for other types of important programming that, unlike regional sports programming, can be singled out as a categorical matter. Such other programming would have to be addressed on a program-specific basis. For example, top rated shows like Pawn Stars and American Pickers, which are carried on the History Channel (which is affiliated with Comcast), are top-rated shows that are must have programming to a large number of subscribers. The list could go on and on. But the point is that, if competing MVPDs have to litigate with respect to each and every such program whether lack of access could significantly hinder their ability to compete, competition could be seriously impaired while such litigation is under way. Moreover, even if access to one popular program or network would not, in and of itself, significantly hinder the ability to compete, the inability to obtain access to multiple programs or networks controlled by multiple cable operators could, collectively, have a devastating impact on competition. Only extension of the exclusive contracts ban in Section 628(c)(2)(D) would obviate the need for case-by-case litigation. It therefore should continue to apply to all vertically integrated programming. *NPRM* at ¶ 53.

B. Vertically Integrated Programmers Continue to Have an Incentive to Favor Their Cable Affiliates

Changes in the market since 2007 not only have not eliminated the ability of vertically integrated cable operators and their programming affiliates to withhold critical programming to harm competing MVPDs, they also have done nothing to alter their incentive to do so. To be sure, competition in the video distribution segment of the market has grown as competitive

MVPDs, and in particular wireline MVPDs (which the Commission has recognized provide the strongest and most effective competitive constraint on cable incumbents),[46] have succeeded in winning new subscribers. On a national basis, DBS has increased its subscribership from approximately 30 percent in 2007 to 33.9 percent of subscribers today, while wireline providers have increased their subscribership from approximately 2 percent to 7.6 percent over the same period.[47] AT&T, in particular, increased its subscribership from less than one million in 2007 to about four million earlier this year, or somewhat less than 4 percent of all MVPDs nationwide.[48] But this increase in subscribership to competitive MVPD services has not diminished cable's incentive to withhold popular programming to hurt their competitors (as AT&T's experience in San Diego and Connecticut amply demonstrate), which is what led Congress to ban exclusive programming contracts between vertically integrated cable operators and programmers in the first place. That is because cable continues to control a significant majority of video subscribers. In particular, cable incumbents continue to control 58.5 percent (down from 67 percent in 2007) of MVPD subscribers nationally.[49] They also hold a significant lead in local markets as well. Cable incumbents' subscribership thus continues to dwarf that of their rivals, and in particular that of their wireline rivals.

Given the much smaller number of subscribers served by their competitors, vertically integrated cable operators and their programming affiliates continue to have strong incentives to withhold programming to prevent rivals from offering a competitive alternative and thus taking

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[46] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5126 (2007).

[47] NPRM, Appendix A.

[48] AT&T Investor Briefing 1Q 2012, at 8.

[49] NPRM, Appendix A.

away subscribers and the revenues they provide. That is because in the case of such vertical arrangements, the combined entity considers not only the impact of such withholding on revenues from the sale of programming, but also its impact on revenues from the sale of cable services to subscribers. Where rivals have relatively low subscribership and competition is still fragile, as it is today, an exclusive arrangement that prevents a rival from obtaining critical programming that it needs to compete can effectively prevent that rival from mounting an effective competitive challenge. The increased revenues available to the incumbent cable operator – both from subscribers taken away from its rival and the premium it can charge its own subscribers due to the compromised position of that rival – more than offset any reduction in revenue from foregoing the sale of programming to unaffiliated entities.

If anything, the incentive of vertically integrated cable operators to block rivals' access to programming, and thus prevent downstream competition in the video distribution market, is stronger today than it was in 2007. As the Commission previously has recognized, competition from wireline video providers, like AT&T, has a much greater impact on the price of cable service than does competition from DBS.[50] Insofar as DBS subscribership has changed little, while competitive wireline providers subscribership has almost quadrupled, from approximately 2 percent to 7.6 percent,[51] since 2007, vertically integrated cable operators incentive to withhold programming from their wireline rivals is commensurately greater than it was before. AT&T's experience in Connecticut bears this out. As discussed above, Cablevision/MSG withheld the HD streams of MSG/MSG+ programming from AT&T, but made those streams available to

[50] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992* at ¶ 50, MB Docket 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5105, 5126 (2007), *aff'd sub nom. Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert denied*, 557 U.S. 904 (2009).

[51] NPRM, Appendix A.

DIRECTV. Thus, there is little doubt that, if the exclusivity ban is lifted, vertically integrated cable operators will act on their incentives to deny access to critical programming to their competitors, and their wireline competitors in particular. In that event, competition from AT&T and other wireline providers could whither, denying consumers the sort of robust competition and diversity in the provision of video programming as Congress intended.

C. Relaxing the Exclusive Access Prohibition and Relying on Complaints is Not the Answer.

In the *NPRM*, the Commission asks whether relying on a case-by-case complaint process would be sufficient to preserve and protect competition and diversity in the video distribution market if the exclusive contract prohibition were to sunset.[52] They would not. The history of program access complaints, and AT&T's own experience litigating cases of unlawful withholding, plainly demonstrates that the threat of adjudication does not dissuade vertically integrated cable operators and their affiliated programmers from engaging in anticompetitive withholding, and that a case-by-case process takes far too long (in some cases, several years) to redress such conduct, during which consumers are deprived of the programming and competitive alternatives they desire, contrary to congressional objectives.

Although section 628 expressly provides that the Commission should resolve program access complaints expeditiously, the Commission's program access complaint process has done anything but resolve complaints quickly. Prior to 1998, when the Commission adopted a non-binding goal of resolving exclusivity complaints within five months, and all other program access cases within nine,[53] the Commission took a year, on average, to resolve such cases, with

[52] NPRM at ¶ 47.

[53] *Implementation of the Cable Television Consumer Protection Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822, ¶ 41 (1998) (*Ameritech New Media Order*).